

**Fair Political Practices Commission**  
**MEMORANDUM**

**To:** Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

**From:** Theis Finlev, Executive Fellow  
John Wallace, Assistant General Counsel  
Luisa Menchaca, General Counsel

**Date:** April 26, 2005

**Subject:** Adoption of Amendments to Regulation 18705.5 - Materiality  
Standard: Economic Interest in Personal Finances.

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**I. Executive Summary**

Public officials are prohibited from participating in governmental decisions that may have a material financial effect on their economic interests, including the economic interest that every public official has in his or her personal finances. In general, a decision affecting the governmental salary of an official or a member of his or her immediate family does not give rise to a conflict of interest unless the decision has a unique personal financial effect on the official or the member of his or her immediate family. According to regulation 18705.5, which establishes the materiality standard for personal finances effects, the financial effects of a public official's decision are not material, and thus are not disqualifying interests, "unless the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction...or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position."

Staff has identified two issues that need clarification under the current regulation:

1. The regulation permits public officials to participate in decisions to set a salary for a member of their immediate family, if the member of his or her immediate family is the only person in a job classification or position.
2. The regulation refers to hiring and firing, but not appointments, by the public official.

To remedy this situation, staff proposes amendments to regulation 18705.5 to declare material the financial effect of a decision that has a "unique" financial effect on a member of a public official's immediate family; and to include "appointments" as decisions which could have material financial effects on the public official or a member of his or her immediate family.

## II. Background

The purpose of the conflict-of-interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> is to ensure that public officials do not participate<sup>2</sup> in governmental decisions in which they have a financial interest. Section 87103 begins as follows:

“A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following....” (Emphasis added.)

Subdivisions (a) through (e) of § 87103 enumerate five economic interests, which, if foreseeably and materially affected by a decision, would constitute a disqualifying “financial interest in a decision.” As enacted in 1974, the statute did not include the words underlined in the passage above. Those words were added by legislative amendment in 1985. (Chapter 611, Stats. 1985.)

Before the 1985 legislative amendment, it was possible to argue that since the statute referred only to effects on the five interests enumerated at subdivisions (a) through (e), a direct financial effect on the official or a member of his or her immediate family could not give rise to a conflict of interest. The 1985 amendment put such claims to rest. Since 1985, section 87103 expressly states that an official may have a conflict of interest in a decision whenever there is a reasonably foreseeable material financial effect on the official himself, members of his or her immediate family, or on any of the economic interests listed at subdivisions (a) through (e). The Commission adopted a regulation in 1985 setting the materiality standard for this new personal financial effect rule at \$250 in any 12-month period.

Once a public official identifies his or her relevant economic interests, the official must evaluate whether the decision will have a material financial effect on any of those

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<sup>1</sup> All references are to sections 81000-91014 of the Government Code.

<sup>2</sup> The Act’s conflict-of-interest provisions apply only where a public official “make[s], participate[s] in making or in any way attempt[s] to use his [or her] official position to influence a governmental decision in which he [or she] knows or has reason to know he [the official] has a financial interest.” (Section 87100; regulation 18700(b)(2).) A public official “makes a governmental decision” when the official, acting within the authority of his or her position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; regulation 18702.1.) A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive review, the official negotiates, advises or makes recommendations to the decision-maker regarding the governmental decision. (Section 87100; regulation 18702.2.) A public official is attempting to use his or her official position to “influence” a decision before his or her own agency if, for the purpose of influencing the decision, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Section 87100; regulation 18702.3.)

economic interests. The official must find the applicable materiality standard in Commission regulations. (Regulation 18700(b)(5); regulation 18705, et seq.)

Pursuant to regulation 18705.5, “[a] reasonably foreseeable financial effect on a public official’s personal finances is material if it is at least \$250 in any 12-month period.”

However, subdivision (b) provides that “[t]he financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, *unless the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position.*” (Emphasis added.) A public official’s immediate family includes the spouse and dependent children. (Government Code section 82029).

The following two closed enforcement cases demonstrate two scenarios that are not addressed by application of this personal financial effects rule.

- In 1997, the executive director of the Victor Valley Community College made a decision to significantly increase his spouse’s salary. His spouse was a manager at the college and the only one in her classification. The Enforcement Division was not able to pursue the case because the language of the regulation did not make the conduct a violation.
- In 1997, the mayor of Oakland appointed his spouse to an unsalaried position on the Oakland Port Authority. At the time, the Oakland city attorney advised the mayor that he did not have a conflict of interest that prohibited him from making the appointment, even though his spouse received a cell phone, membership to an exclusive dinner club, and a car allowance as a result of the appointment. The city attorney based her advice on the language of the regulation, which refers to hiring and firing, but does not refer to appointing.

### **III. Proposed Regulatory Action**

Commission staff proposes amending regulation 18705.5, subdivision (b) as follows:

“The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her

immediate family, or to set a salary for the official or a member of his or her immediate family, which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family is only person in the job classification or position."

### **How the Change Addresses the Problem**

By adding the word "appoint" to the regulation, the Commission would make it clear to a public official that it is unlawful for a public official to appoint the official or his or her spouse or dependent children to a position that is salaried, or that is unsalaried but offers monetary benefits. By adding the suggested language to the end of the regulation, the Commission also clarifies that it is unlawful for a public official to increase the governmental salary of a member of his or her immediate family, when the family member is the only individual in the job classification or position.

### **IV. Determination Not to Act**

At the pre-notice meeting on this regulatory amendment, Commissioner Huguenin pointed out that the Attorney General has opined that a determination not to act is still considered participation in a government decision under certain circumstances. He asked how determinations not to act would be considered under this regulation.

Government Code section 1090 prohibits public officials from entering into certain contractual relationships with governmental entities while in their official capacity. Staff researched two section 1090 opinions issued by the Attorney General that opined that the terms of section 1090 cannot be avoided by merely having the financially interested officer abstain from participating in the making of the contract, on the grounds that section 1090 constitutes an absolute prohibition against entering into the prohibited contract.

For example, in one case, a probationary teacher was married to a member of a school district's governing board. The probationary teacher would attain permanent status automatically unless the governing board intervened to the contrary. Section 1090 was construed to prohibit the board member from participating in the new contract for his/her spouse. Further, even if the board did not intervene, the contract would still violate section 1090 because, whether or not the school board intervened, a new contract would result for the teacher.

Commissioner Huguenin pointed out that this position by the Attorney General could present a problem for regulation 18705.5. Situations could arise where an official's non-participation in a decision could result in a prohibited material financial effect on a member of that official's immediate family.

However, section 1090, enforced by the Attorney General, differs in many ways from the conflict-of-interest rules that the Commission enforces. Section 1090

prohibits public officials from being financially interested in contracts made by them in their official capacity, and creates a presumption that an official participated – in most instances, a board member cannot disassociate himself/herself from the contract by abstention. Section 1090 voids the contract. The Act, on the other hand, prohibits officials from participating in decisions which have a material effect on their financial interests. Generally, the decision itself may be made without the financially interested official's participation.

Regulation 18702.1(a)(5) states that a public official “makes a governmental decision” when, acting within the authority of his or her office or position, **“determines not to act...unless such determination is made because of his or her financial interest.”**

At issue here is what is meant by “because of his or her financial interest.” Generally, under the Act, if participation in a decision would result in a disqualifying material financial effect on an official's economic interest, the Act would prohibit the official from acting. Consequently, the regulation provides that when the official determines not to act, that inaction would not be considered to be “making” a disqualifying decision. Conversely, if the decision would not affect the official's economic interests materially, the determination not to act may be considered making a decision under regulation 18702.1, but it would not be further analyzed because a material financial effect would be lacking.

Thus, the scenario that Commissioner Huguenin raises is not addressed under the Act's abstention provisions. However, staff believes that in the case of a school board, one member's inaction would rarely alter the outcome since the other board members could presumably still make an independent decision on the matter.

## **V. Recommendations**

Staff recommends that the Commission approve the proposed amendments to regulation 18705.5 for adoption at the May Commission meeting without change. Should the Commission wish staff to further explore the “abstention” issues, staff recommends further study of regulation 18702.1 for consideration as part of next year's regulatory proposals.

Attachment:

Amendments to Regulation 18705.5